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No. 94-790

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In The

# Supreme Court of the United States

October Term, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Petitioners,*

v.

ZIYA K. KORAY,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

## BRIEF FOR THE RESPONDENT ZIYA K. KORAY

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## QUESTION PRESENTED

Section 3585(b) of 18 U.S.C., entitled *"Credit for Prior Custody"* states that a "defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The question presented is whether "official detention" includes time spent held under any court ordered conditions restricting liberty which constitute total "jail-type confinement," or is limited solely to time spent held in the custody of the Attorney General under a "detention order" issued under 18 U.S.C. § 3142(e).

## PARTIES TO THE PROCEEDINGS

The statement in the Brief for the United States is adopted.

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## BRIEF FOR THE RESPONDENT ZIYA K. KORAY

## OPINION BELOW

The statement in the Brief for the United States is adopted.

## JURISDICTION

The statement in the Brief for the United States is adopted.

## STATUTORY PROVISION INVOLVED

Section 3585 of Title 18 provides:

**Calculation of a term of imprisonment**

(a) **Commencement of sentence.** A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) **Credit for prior custody.** A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences –

> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

## STATEMENT

1. On April 23, 1991, Mr. Ziya Koray was arrested for laundering monetary instruments in violation of 18 U.S.C. §1956(a)(1). After his arrest, Mr. Koray was detained under an 18 U.S.C. §3142 "detention order" which requires commitment to "the custody of the attorney general for confinement." 18 U.S.C. §3142(i)(2). Koray

was confined at a county jail in Rockville, Maryland. On June 18, 1991, Mr. Koray entered a plea of guilty to the charged offense in the United States District Court for the District of Maryland. On June 25, 1991, after his guilty plea was entered, but prior to sentence, a magistrate judge entered an order pursuant to 18 U.S.C. 3142(c) "Release on conditions." This court order placed Mr. Koray in the custody of the federal Pre-trial Services Agency and stated that he was to be "confined to premises of VOA [The Volunteers of America] and shall not be authorized to leave for any reason unless accompanied by Special Agent Dennis Bass." The premises of the VOA specified in the order was a "halfway house type facility" located in Baltimore, Maryland. On October 21, 1991, almost four months after his guilty plea, the district court sentenced Mr. Koray to 41 months of imprisonment. He remained at the VOA halfway house until November 25, 1991, when he began serving his sentence at Allenwood Federal Prison Compound in Pennsylvania. By then, he had spent 150 days totally confined to and subject to the rules and restrictions of the halfway house. Pet. App. 2a, Joint App. 10, 12, 25, 32.

Koray received credit for the 64 days spent detained in the custody of the Attorney General in the county jail up to June 25, 1991, pursuant to 18 U.S.C. §3585. He sought but was denied credit by the Bureau of Prisons (BOP) for the 150 days he was confined to the halfway house under the "Release on conditions" order between June 25, 1991 and November 25, 1991. Upon exhausting his administrative remedies, Mr. Koray filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking such credit. The

district court denied the petition, finding that a "Release on conditions," no matter how restrictive the conditions, can never amount to "official detention" under 18 U.S.C. §3585(b), Pet. App. 2a, 25a-28a.

2. The court of appeals reversed. Pet. App. 1a-24a. The court held that the presentence time a defendant is confined in a halfway house pursuant to a court order may be "official detention" if the restrictions on the defendant's liberty were equivalent to "jail-type confinement." Because the district court made no factual findings regarding the circumstances of Koray's confinement at the halfway house, the court of appeals necessarily accepted *arguendo* Koray's factual allegations in the district court, which the BOP did not challenge. Koray alleged that he was permitted to leave the halfway house only once in 150 days (for a medical exam), that he had to account for his presence five times a day, that he was subject to random breath and urine tests, that his access to visitors was limited in both time and manner and that there was a paucity of vocational, educational and recreational services compared to a federal prison facility. The court of appeals held that the combination of court ordered total 24 hour a day confinement and these uncontested allegations, and "because there had been no finding that Koray was in fact held" in a drug treatment facility or a halfway house which he left part of the day on work release, were sufficient to require that the case be remanded to the district court "for the necessary fact finding." Pet. App. 19a, 20a, 24a.

The court decided not to defer to the BOP's current view that "official detention" under §3585(b) is limited to

defendants confined to the custody of the Attorney General pursuant to a "detention order." Under this view, no matter how restrictive the conditions of a "Release on conditions" order, such an order could never result in "official detention". The appellate court found there was no indication that Congress had intended the statute to be read so narrowly.

3. Although it acknowledged that most courts of appeals, with the exception of the Ninth Circuit, had deferred to the BOP's current view, the court analyzed the plain meaning of the words "official detention" and found no support for that view. It pointed out that nothing in the statute requires or suggests that "detention" means only detention in the custody of the Attorney General pursuant to a "detention order." Additionally, the court noted that the BOP itself does not always limit "official detention" to time served under the custody of the Attorney General. The BOP has characterized other custody as "constructive federal custody" and has given presentenced defendants credit for certain times spent in state facilities, even though the defendant was not in the Attorney General's custody. Pet. App. 14a-17a. The Court concluded that Koray's detention was "official" because a court may detain a person as officially as the Attorney General and because it was a court order which placed Koray in the custody of the Pretrial Services Agency and confined him to the premises of the halfway house. Pet. App. 13a, 14a. The court of appeals stated that in construing the statutory language of §3585, it could not ignore the obvious and ordinary meaning of the statutory language. To most people, being forced by court order to live in a halfway house is to be held in custody. Pet. App. 18a.

The court of appeals declined to give the BOP's current interpretation of 18U.S.C. §3585(b) deference because the "Program Statements" in which it appears are merely internal agency guidelines which the BOP may alter at will, as opposed to published regulations subject to the rigors of the Administrative Procedure Act, such as public notice and comment. Pet. App. 9a. Even according the BOP's interpretation "some level of deference," the court concluded that the BOP had not engaged in the necessary "reasoned analysis" of the issue. The court of appeals reviewed the legislative history of 18 U.S.C. §3585. The predecessor statute, 18 U.S.C. §3568 used the words "in custody" rather than "official detention". The court of appeals concluded, as had all the circuits which considered the question, that this change was not intended to alter the meaning of the statute, and that the history of the statute revealed a progressive enlargement of the defendants eligible to receive sentence credit. Pet. App. 4a, 5a, 13a. It noted that the BOP had considered the degree of restraint under the predecessor statute in determining sentence credit, but had changed to its current view based on the change in language from "in custody" to "official detention", despite the unanimity of judicial opinion that no change in meaning was intended by this change in language. Pet. App. 10a-12a. The court therefore determined that the BOP's current interpretation required only "minimal deference" because it was unreasonable and contrary to the fairness Congress must have intended. Pet. App. 18a.

Koray has been released pending further proceedings. *Id.* at 51a.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3585(b) of Title 18, entitled "Credit for prior custody", grants defendants sentence credit for time spent in "official detention" before the sentence began to be served. It is the current opinion of the Bureau of Prisons (BOP), the agency which calculates sentence credit initially, subject to judicial review, see *United States v. Wilson*, 112 S.Ct. 1351 (1992), that "official detention" is limited to defendants detained under a "detention order" (18 U.S.C. 3142), in the custody of the Attorney General in a penal or correctional facility.

In this case the court of appeals has narrowly extended the BOP's interpretation by defining "official detention" as including court ordered confinement to a halfway house which is equivalent to "jail-type confinement." The court's precise holding is limited to those cases in which a court order imposes total 24 hour confinement at facilities which have rules similar to prison rules. In fact, this holding, which allows the "degree of restraint" imposed upon the defendant to be considered, was once the position of the BOP.

The Third Circuit's ruling is supported by the plain meaning of the statute, the language in related statutes, the legislative history of Section 3585(b), Congress' intent with respect to sentencing, the rule of lenity and fundamental fairness. The BOP's current opinion, urged by the Solicitor General, is not entitled to deference because it is unreasonable and is based on an incorrect interpretation of a change in the language of §3585(b) from the predecessor statute, an interpretation directly contrary to the

unanimous opinion of every court of appeals to consider the meaning of this change in language.

Additionally, the BOP's current view is not entitled to deference because it appears in a "Program Statement", which merely reflects the opinion of the agency and may be changed at will, as opposed to a published regulation promulgated under the Administrative Procedure Act, subject to public notice and comment. As this court has recognized, Congress intended the courts to play a significant role in determining sentence credit by having the power to review BOP sentence credit decisions. *Wilson, supra* at 1355. To completely defer to the BOP's current view, no matter how unreasonable, and in an area of judicial expertise (non-technical statutory construction) would make judicial review of important sentence credit determinations meaningless.

The court of appeals decision is in accord with Congress' approval of the use of halfway houses as detention facilities because it will permit federal judges the discretion necessary to use halfway house confinement before sentence as a means of dealing with the mounting problems of prison overcrowding and cost, and also allow greater flexibility in providing for the safety of cooperating defendants, without prejudicing defendants by increasing their total confinement.

Petitioner mischaracterizes this narrow and precise decision as elusive and amorphous, raising the specter of the BOP and the courts being deluged with petitions for sentence credit from prisoners claiming that they were under jail-type restraint. Unlike the line of cases from the Ninth Circuit, which allow sentence credit for less than

complete confinement to a halfway house, if the conditions of release are so restrictive they "approach . . . incarceration." *Mills v. Taylor*, 967 F.2d 1397, 1400 (9th Cir. 1992), the court of appeals expressly excluded from its holding even those confined in a drug treatment facility, or in a halfway house with work release privileges, and pointed out that other release conditions such as home confinement, residing with a relative or confinement for medical treatment which met the Ninth Circuit standard would not meet its definition of jail-type confinement.

The court of appeals decision will not be administratively difficult to implement nor will it result in disparate interpretations of sentence credit claims resulting in a lack of a uniform national policy. It will apply to only a limited number of cases. It does not apply to *any* court ordered residence in a halfway house. Halfway house residence by defendants prior to sentence is limited to a small percentage of defendants. Only those defendants whom the court's order totally confines to the premises of the halfway house, and who are unable to leave even for reasons such as work release or schooling, will meet the initial test of jail-type confinement. All the BOP need do in these cases to determine whether the conditions of release require such total confinement is to read the "Release on conditions" order which sets out those conditions, and which is normally part of the defendant's prison file. The determination of this straightforward question – does the court order impose total confinement? – does not require interpretation of a standard so amorphous or elusive it is likely to produce disparate results in the BOP's awarding of sentence credit nationwide. Only if such total confinement at the halfway house

is specified in the order will the BOP have to go on to determine whether the operational rules at the particular halfway house were sufficiently stringent so that the combination of total confinement to premises and such rules constituted "jail-type confinement." Given the less than infinite variety of operational rules that could prevail at halfway houses, and the BOP's frequent dealings with these facilities, the Third Circuit's ruling will not render more difficult the BOP's performance of its duties, and will increase the fairness with which sentence credit is awarded.

## ARGUMENT

**THE TIME SPENT BY A DEFENDANT HELD PRIOR TO HIS SENTENCE UNDER COURT ORDERED RESTRICTIONS ON HIS LIBERTY WHICH CONSTITUTE TOTAL "JAIL-TYPE CONFINEMENT" SHOULD BE CONSIDERED TIME SPENT IN "OFFICIAL DETENTION" UNDER 18 U.S.C. §3585(b) AND THEREFORE CREDITED TOWARD HIS SENTENCE.**

### A. Neither The Text Of The Statute, The Text Of Related Sentencing Statutes, The Program Statements Of The Bureau Of Prisons Interpreting The Statute, Or The Statute's Legislative History Provide A Sufficient Basis For Concluding That The Meaning Of "Official Detention" Should Be Limited To Time Spent Held Under An 18 U.S.C. §3142 Detention Order In The Custody Of The Attorney General

Section 3585(b), *"Credit for Prior Custody"*, provides that a defendant "shall be given credit toward the service of a term of imprisonment for any time spent in official

detention" before he begins serving his sentence. The phrase "official detention" is not defined in the statute, but what the phrase dues *not* mean is clear; it does not mean only time spent confined under a detention order in the custody of the Attorney General. As the court of appeals pointed out, there is no language in the statute which requires or even suggests such a limited reading of "official detention." Pet. App. 13a, 14a.

The only way a defendant being held to answer a federal charge may, prior to sentence, "be committed to the custody of the Attorney General for confinement in a corrections facility" is if he is the subject of a "detention order" issued pursuant to the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* It is the current opinion of the BOP that "official detention" means only time confined under such a *"federal detention order"*, and that any time spent confined under a court ordered "Release on conditions" under §3142(c), no matter how restrictive such conditions, "is not considered as time spent in official detention." BOP Sentence Computation Manual CCCA Program Statement 5880.28 (February 21, 1992 & Supp. 1994) (emphasis supplied). However, as the Third Circuit concluded, the absence of language which could easily have been used if Congress intended such a limited and technical meaning strongly suggests a broader interpretation is appropriate.

Congress enacted both the Bail Reform Act and §3585(b) as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. The same Congress that in 1984 created a "detention order" in the Bail Reform Act changed the language of the sentence credit provision from the words "in custody", used in 18

U.S.C. §3568, the predecessor sentence credit statute, to "official detention" in 18 U.S.C. §3585(b). If that same Congress had intended to limit "official detention" to only time confined in the custody of the Attorney General pursuant to a detention order, it could easily have said so. Congress could have said "official detention" is only detention under a Bail Reform Act "detention order," or is only detention under the custody of the Attorney General, or both. Additionally, Congress could have said sentence credit should be given for "any time spent under an order of detention," without using the phrase "official detention" at all. Congress could also have entitled §3585(b) "Credit for time served under a detention order," or "Credit for time served in the custody of the Attorney General," rather than entitling the section "Credit for Prior Custody." Congress chose to say none of these things.

What Congress did choose to say in related sentencing provisions of the Comprehensive Crime Control Act in which it used the phrase "official detention," and the BOP's own interpretation of those provisions, demonstrate that "official detention" is not limited to time confined under a "federal detention order" and does include halfway house confinement.

Section 18 U.S.C. §3622, entitled "Temporary release of a prisoner," permits the BOP to release a sentenced prisoner to "participate in a training or educational program in the community while continuing in official detention at the prison facility" (18 U.S.C. 3622(b)), or to "work at paid employment in the Community while continuing in official detention at the penal or correctional facility" 18 U.S.C. §3622(c). By stating that a prisoner

could be on work release while being in "official detention" and differentiating between a "prison facility" and a "penal or correctional facility", Congress demonstrated that it was not limiting "official detention" to total confinement in a traditional prison. Since work release is one of the features associated with halfway houses, this language shows that Congress intended that a prisoner could be in "official detention" while residing in a halfway house. Thus, in a related provision, §3622(c), Congress "used official detention according to its ordinary meaning, and there is no reason to think that Congress used the same phrase in any more technical or restrictive fashion in §3585(b)." *United States v. Davis*, 763 F.Supp. 638, 641 (D.D.C. 1991).

The Solicitor General states that "basic canons of construction suggest"[1] that "official detention" should have the same meaning in §3585(b) as it does in these related statutes. These statutes use "official detention" to describe the status a *sentenced* prisoner must remain in while participating in a training program in the community (§3622(b)), or while being permitted to be on work release (§3622(c)). Section 3622(c) requires that the "official detention" be in a "penal or correctional facility." Because the Solicitor General assumes that a halfway house is neither a "penal or correctional facility," he concludes that residence in a halfway house cannot be "official detention" within the meaning of either §3622(b) or (c) because these "related statutes make clear that a

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[1] Brief for the United States at p. 13.

sentence of imprisonment may be served only in a penal or correctional facility under federal or state control."[2]

However, the fact is that the BOP does consider a halfway house to be a "penal or correctional facility" within the meaning of §3622(c), and therefore considers sentenced prisoners on work release at halfway houses to be in "official detention" within the meaning of the section. If the BOP did not take this position it would be violating the clear mandate of §3622(c), that sentenced prisoners continue in "official detention" while on work release, the thousands of times each year it transfers sentenced prisoners to halfway houses where they go on work release.

In a recent Program Statement dealing with its authority to place sentenced prisoners in Community Corrections Centers (CCCs), the BOP interpreted 18 U.S.C. §3624(c) which encourages non-prison confinement, including home confinement, at the end of a sentence,[3] and 18 U.S.C. §3621(b), which gives the BOP

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[2] Brief for the United States at pp. 12, 13.

[3] 18 U.S.C. §3624(c) provides as follows:

**Pre-release custody.** – The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

authority to designate any "penal or correctional facility" as the place of imprisonment, as not restricting the BOP from placing sentenced inmates in CCCs. The BOP uses the phrase "CCCs" interchangeably with halfway houses in this Program Statement, in which it refers to "CCCs, commonly referred to as halfway houses."[4] In this same Program Statement the BOP unequivocally states *"[a] CCC meets the definition of a penal or correctional facility"* as those terms are used in 18 U.S.C. §3621(b) (emphasis supplied).[5]

Basic canons of construction suggest that if a halfway house is a "penal or correctional facility" within the meaning of 18 U.S.C. §3621(b), it is a "penal or correctional facility" within the meaning of a related statute, 18 U.S.C. 3622(c). Therefore, the meaning of "official detention" in §3622(c) includes confinement in a halfway house, because a halfway house is a "penal or correctional facility." Finally, since the meaning of "official detention" in §3622(c) includes confinement in a halfway house, the meaning of "official detention" in a related statute, §3585(b), the statute at issue in this case, must

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[4] BOP Program Statement 7310.02(5a) (1993). The BOP considers the halfway house in which Koray was confined to be a "Community Corrections Center or CCC" because it so described it in three of its four responses to his sentence credit request. Joint App. 26, 30, 32.

[5] BOP Program Statement 7310.02(4) (1993). BOP Program Statement 7310.02 (1993) reproduced in Respondent's Appendix at App. 1-7.

have the same meaning, and must include confinement in a halfway house.

Petitioner's assertion that the penal or correctional facility to which the BOP may assign a sentenced prisoner under 18 U.S.C. §3621(b) must be under federal or state control is not found within any statute. All that §3621(b) provides is that the facility "meets minimum standards of health and habitability established by the Bureau, *"whether maintained by the federal government or otherwise."* 18 U.S.C. §3621(b) (emphasis supplied).

There are words used in other parts of §3585 which also demonstrate that "official detention" cannot be limited to time spent under a "federal detention order." Section 3585(b)(2) provides that a defendant is to receive sentence credit for time spent in "official detention"

> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed.

Time spent under *State* court orders of commitment within the chronology set forth in 3585(b)(2) is clearly "official detention" for credit against the federal sentence. The BOP itself has acknowledged this. As the court of appeals said:

> We note that the Bureau has characterized other custody as 'constructive federal custody' and has been willing to give presentence defendants credit under §3585 and its predecessor §3568 for certain time spent in state facilities, even though

> the defendant was not in the Attorney General's custody. Pet. App. 15a.[6]

There is no reason why custody imposed by an official order of a federal court should not be treated similarly.

The legislative history of §3585(b) also demonstrates that the BOP's current limited interpretation of "official detention" is wrong. Whether confined under a "federal detention order" or a very restrictive "Release on conditions" order, a defendant is in custody. Section 3585(b) is entitled "Credit for prior custody." The predecessor statute, §3568 used the phrase "credit for time in custody" in its title and provided sentence credit for time spent "in custody." 18 U.S.C. §3568 (1982) (repealed). As Petitioner states:

> every court of appeals to consider the question has held that the phrase "official detention" in Section 2585(b) has the same meaning as the phrase "in custody" in the predecessor statute. (Brief for the United States at p. 11, n.9).

A Senate Report has described present §3585(b) as providing sentence credit for time spent "in official custody" S. Rep. No. 225, 98th Cong. 1st. Sess. 129 (1983). The fact that it is undisputed that Congress used "custody" and "official detention" interchangeably is significant in analyzing the relationship between the Bail Reform Act and §3585(b).

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[6] The Solicitor General acknowledges that the BOP "grants credit for time spent in state custody." (Brief for the United States at p. 11).

Since "custody" is synonymous with "official detention", as used in §3585(b), then at least some forms of custody constitute "official detention." In the Bail Reform Act Congress used the word "custody" repeatedly. One of the conditions of release a court may impose is a condition that the person "*return to custody* for specified hours following release for employment, schooling or other limited purposes." 18 U.S.C. §3142(c)(B)(xiii) (emphasis supplied). This language suggests that Congress envisioned that a "Release on conditions" order could include "custody" of varying degrees of restrictiveness, from custody with specified reasons for release, up to total confinement and that "custody" was not limited to custody under a "detention order." Since "custody" and "official detention" have the same meaning under §3585(b), at least highly restrictive "custody" such as Koray endured constitutes "official detention" under §3585(b). This language also shows that congress contemplated that court-ordered confinement to a halfway house could be a form of "custody," and therefore "official detention", because special conditions such as work release are available at halfway houses.

The Solicitor General argues that since the legislative history shows that §3585(b) was not intended to change the rules for sentence credit embodied in the 1966 predecessor statute, and because courts interpreting the predecessor statute prior to §3585(b)'s enactment in 1984 held it to limit sentence credit to those detained in a place of confinement, and since Congress must have been aware of these judicial interpretations, Congress did not intend sentence credit for defendants not actually incarcerated. (Brief for the United States at pp.17-21).

However, the cases decided under the predecessor statute did not deal with defendants in halfway house confinement. These cases dealt with defendants who were allowed to be at large before sentence, but were subjected to rules and conditions limiting their movement or travel such as requiring periodic reporting to a probation officer, turning in passports, and avoiding contact with certain persons. These decisions simply held that "in custody" as used in predecessor statute §3568 did not apply to defendants released at large on bail no matter what restrictions they had been placed under. See *Cerrella v. Hanberry*, 650 F.2d 606, 607 (5th Cir.), *cert. denied*, 454 U.S. 1034, 102 S.Ct. 573, 70 L.Ed.2d 478 (1981); *United States v. Robles*, 563 F.2d 1308 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978); *Polakoff v. United States*, 489 F.2d 727, 730 (5th Cir. 1974); *Ortega v. United States*, 510 F.2d 412 (10th Cir. 1975) (per curiam). As one court stated in a case quoted by the Solicitor General,[7] "in custody" does not "refer to the stipulations imposed when a defendant is *at large* on conditional release." *United States v. Peterson*, 507 F.2d 1191, 1192 (D.C. Cir. 1974) (per curiam) (emphasis supplied). Therefore, those decisions, and presumed congressional awareness of them, provide no evidence that Congress intended to limit sentence credit to exclude confinement at a halfway house.

The Solicitor General argues that the Court of Appeals was required to defer to the BOP's current view of the meaning of "official detention", not because it is necessarily correct, but because it is "reasonable", relying

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[7] See Brief for the United States at p.20.

primarily on *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Brief for the United States at p.22).

Under *Chevron*, the first question is "whether Congress has spoken to the precise question at issue. If the intent of Congress is clear", which is Respondent's position as set forth in Point B, *infra*, that intent controls. Only "[i]f the statute is silent or ambiguous with respect to the specific issue," does the question become whether the agency's interpretation "is based on a permissible construction of the statute". *Chevron*, supra, at 842-43.

However, "[t]o read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent,' would be seriously overbroad, counterproductive and sometimes senseless." Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986).

The unreasonableness of the BOP's current view is demonstrated by the fact that the BOP has erroneously revised its previous program statement on the subject of sentence credit. This BOP change of position completely disregards the unanimous judicial interpretation of §3585(b)'s legislative history, and therefore, its current view is entitled to no deference. The previous BOP Program Statement dealing with sentence credit immediately prior to the current (1992) Program Statement was issued in 1979, when predecessor statute 18 U.S.C. §3568 was in effect. In that previous Program Statement the BOP, in defining the meaning of "in custody", distinguished

between "[t]ime spent in residence in a residential community center" where "the degree of restraint . . . is not sufficient restraint to constitute custody," as opposed to "[t]ime spent in jail-type facility . . . as a condition of bail or bond," which the BOP *then* viewed as "creditable as jail time because of the greater degree of restraint." Bureau of Prisons, Program Statement No. 5880.24(5)(b)(5) (Sept. 5, 1979). This analysis based on the degree of restraint was changed in 1992 in the current BOP Program Statement interpreting §3585(b). In 1989, after §3585 went into effect, a BOP Operations Memorandum written by its General Counsel stated simply that under new §3585(b) sentence credit would be given for time spent "in pre-sentence custody."[8] The current BOP position looks only to whether the defendant was held under a federal detention order and completely disregards the degree of restraint. Despite this unanimity of judicial opinion that the change in phrases from "in custody" to "official detention" was not intended to change the meaning of the statute, the BOP has changed its interpretation of the sentence credit statute based solely on this change in phrases. This is shown by the fact that the BOP retains the degree of restraint analysis for defendants still governed by §3568. Bureau of Prisons, Program Statement 5880.30(7)(b)(5) (July 16, 1993). The BOP's change of position is thus clearly based on an incorrect interpretation of this change in language.[9]

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[8] BOP Operations Memorandum "Credit for Time in Custody Under 18 USC 3585(B)" (October 23, 1989) is reproduced in Respondent's Appendix at App. 8-11. The language quoted above is at App. 9.

[9] In its brief at pp.23-26 the Solicitor General, recognizing the damage done to his deference argument by the BOP's

The BOP's current view should also not be deferred to because, as the court of appeals noted, Program Statements are merely internal agency guidelines subject to being changed at will, rather than published regulations subject to the rigors of the Administrative Procedure Act, including public notice and comment. Pet. App. 9a.

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mistaken change of position, strains to argue that the BOP did not really change its position. Since he cannot deny the BOP's use of the "degree of restraint" language in the earlier Program Statement interpreting §3568, the Solicitor General in effect argues that, as to the use of this language, the BOP said it but didn't mean it; and anyway it never applied it; it was a "narrow exception" that was applied in rare cases, and "was not an adoption of a general functional approach to the credit issue,"; it was merely BOP's recognition that an unpublished court decision "required a limited functional inquiry in a small class of cases." This argument only adds to the reasons for not giving deference to the current BOP Program Statement. Not only can the BOP change its opinion at will, it can change it by simply not applying its own language, without being required to inform anyone that it has done so.

It is also interesting to note that the current BOP view was first set forth in a Program Statement issued *after* Koray had requested sentence credit from the BOP. Koray first sought sentence credit from the BOP in December 1991. Joint App. 22, 25. The initial BOP denials of his request were based on the 1979 Program Statement interpreting predecessor statute §3568. Joint App. 28, 30. Despite the fact that §3585(b) was enacted in 1984 and became effective in 1987, the BOP waited until February 21, 1992 to come up with its current view as to sentence credit. The later BOP denials of Koray's request were based on this current BOP view (Joint App. 34, 35). Perhaps what caused the BOP change in Program Statements was that the facts of Koray's case might have fit under the old "degree of restraint" language, as the court of appeals pointed out, Pet. App. 11a, and the BOP would have been required to apply the words it wrote but didn't really mean.

Unlike the EPA's interpretation in *Chevron*, the BOP's current view is not "supported by the public record developed in the rule making process", *Chevron, supra*, at 863.

An additional argument against judicial deference to the BOP's interpretation of 18 U.S.C. §3585(b) is the lack, in this case the demonstrated lack, of BOP expertise in construing the meaning of non-technical words in a statute, something which courts have unique expertise and experience in doing. We are not dealing with the scientific and technological expertise required, for instance, when the Environmental Protective Agency is promulgating regulations as part of its administering complicated environmental laws or reconciling conflicting policies. Again, in contrast to *Chevron*, this is not a situation in which "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." (*Chevron, supra*, at 865). Nor is it clear that the BOP has been delegated any rule making or policy making powers by Congress on this issue. The BOP, acting for the Attorney General, has merely been given the responsibility for administering the statute. *United States v. Wilson*, 112 S.Ct. 1351, 1355 (1992). We are not dealing with matters of prison security, prison administration or placement of prisoners, which the BOP does have experience and expertise in, and are areas in which courts are and should be reluctant to intrude. Sentence credit, however, is another matter when more than computation of time is required. When the "traditional tools of statutory construction" such as the interpretation of a statute text, an analysis of related statutes and legislative history, and an inquiry into congressional intent on the subject of

which the statute is a part, permit a court to determine Congress' intent on the "precise question at issue," then there need be no judicial deference because, as this Court has stated, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, supra,* at 843 n.9.

Congress intended the courts to play a significant role in sentence credit determination. Section 3585, "Calculation of a Term of Imprisonment" is part of "Subchapter D – Imprisonment" which is comprised of §§3581-3585. This subchapter deals primarily with the powers of the *court* in connection with imposing sentences. In *United States v. Wilson*, this Court held that the Attorney General, acting through the BOP, should continue to calculate credit at the time of sentencing and that this BOP decision was subject to judicial review. Initial computation by the BOP at sentence, and judicial review after exhaustion of administrative remedies, were both "well established procedures", and therefore it was "not lightly to be assumed that Congress intended to depart from a long established policy.", *United States v. Wilson, supra,* at 1355, citing *Robertson v. Railroad Inter Board,* 268 U.S. 619, 627 (1925). The judicial review recognized in *Wilson, supra,* would be rendered meaningless if courts were required simply to defer to the BOP's interpretation of the key phrase in the sentence credit statute. Judicial review must mean more than checking the arithmetic of a BOP sentence credit computation.

> [I]t is clear that in the event there is a dispute between the parties over the right to credit, the dispute must be resolved by the court. No one

> contends that the Attorney General has unreviewable discretion to determine the appropriate credit in any case. *United States v. Wilson*, 112 S. Ct. at 1356 (Stevens, J., dissenting).

The Solicitor General and the current BOP interpretation of "official detention" contend that a defendant is either detained or released pursuant to the Bail Reform Act, and only a detained defendant should receive sentence credit. Congress could not have intended such a black and white, either-detained-or-released criterion because it provided a continuum of graduated levels of release beginning with release on personal recognizance through detention. In 18 U.S.C. §3142, the Bail Reform Act permits a court to include in a "Release on conditions" order any condition which

> [I]s reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community. (18 U.S.C. §3142(c)(XIV)).

Such court ordered conditions may be so restrictive as to equal the confinement under a detention order. Thus, "release" and "detention," as these terms are used in the Bail Reform Act, may not always be mutually exclusive opposites; they may be mirror images of each other. When that occurs, and the release conditions constitute "jail-type" confinement, as they do in this case, a defendant should not be denied sentence credit when he has been completely deprived of his liberty solely because the court order confining him is called a "Release on conditions" rather than a "detention order."

Sentence credit, which involves liberty, should not depend on tortured arguments about nomenclature; the

title of the order of confinement, the name of the place of confinement, or the identity of the jailor, do not change the nature or degree of the confinement. The kind of restrictions on liberty to which a court ordered Koray to be subjected – total confinement to the premises of the halfway house, living under a stringent institutional regimen – should compel the conclusion that he was in "official detention" for the purpose of sentence credit.

### B. The Plain Meaning Of The Words Of The Statute, Congress' General Intent With Respect To Sentencing, The Rule Of Lenity, And, Fundamental Fairness Require That Respondent Receive Sentence Credit For The 150 Days He Was Completely Deprived Of His Liberty By Court Order.

In attempting to discern what Congress meant by the phrase "official detention" in 18 U.S.C. §3585(b) "the ordinary and obvious meaning of the phrase is not to be lightly disregarded." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). "Official" has been defined as something "prescribed or recognized as authorized". Webster's Ninth New Collegiate Dictionary at p.820 (1986). The same dictionary defines "detention" as "a period of temporary custody prior to disposition by a court" see *Id.* at 345.

A magistrate judge issued an official order authorized under 18 U.S.C. 3142(c) entitled "Order Specifying Conditions of Release." This order placed Koray "in the custody of the Pretrial Services Agency and made it a condition of his release that he "shall be *confined to the premises of VOA and shall not be authorized to leave for any reason* unless accompanied by Special Agent Dennis

Bass." (Emphasis supplied). Joint App. 8-15. As the court of appeals concluded, "[i]t is therefore difficult to view Koray's detention as other than official . . . " (Pet. App. 14a).

Koray was in "official *detention*" because he was forced by an order of a court to be totally confined to the premises of a halfway house and to be subject to the numerous restrictions and rules that prevail there "as a period of temporary custody prior to disposition by a court." As Koray has alleged, unchallenged by the BOP, he was permitted to leave the halfway house only once in 150 days (for a medical exam), he had to account for his presence five times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner and there was a paucity of vocational, educational and recreational services when compared to a prison facility. (Pet. App. 19a-20a). As the court of appeals noted, the BOP has admitted that the "Volunteers of America maintains a halfway house similar to the manner in which the Bureau of Prisons may also operate such facilities." (Pet. App. 20a).

Such judicially ordered complete confinement under prison type rules is clearly within the "ordinary and obvious" meaning of "official detention."

In addition to giving effect to the plain meaning of Congress' words, granting sentence credit for jail-type confinement in halfway houses would serve the congressional intent to encourage the use of alternative confinement facilities such as halfway houses. See 18 U.S.C. §3624(c).

> A report by the United States General Accounting Office released in late 1991 found that the prison crowding would be reduced and costly prison building could be avoided by increasing the current use of the halfway house system . . . The cost of housing an inmate in a prison far exceeds the cost for the same inmate at a halfway house.

Garry A. Berger, *Pre-Sentence Halfway House Residents: Are they Entitled to Credit Toward Subsequent Prison Sentences*, 27 Colum. J.L. & Soc. Probs. 191, 194 n.11 (1993). Permitting judges the flexibility to use halfway houses for presentence detainees would alleviate these problems, and would also enable judges to use halfway houses to safeguard or facilitate the cooperation of cooperating defendants, without increasing a defendant's sentence time.

If there is to be no sentence credit even for total halfway house confinement, a judge who wants to utilize such complete confinement to relieve overcrowding at the facility housing defendants detained under an 18 U.S.C. §3142 "detention order", or who wants to change the place of confinement of a cooperating defendant at the request of the Government for safety reasons or to facilitate the cooperation, will find his or her discretion severely restricted. If a defendant is now to understand that he will not receive sentence credit for such confinement because he is being "released", he will be unlikely to sign and agree to the "Conditions of Release" order. Without such agreement by the defendant it is not clear that the court could or should compel such release.

Sentence credit should be given to defendants totally confined to halfway houses because such confinement

meets many, if not all, of Congress' major goals in sentencing. Total confinement at a halfway house and being subject to its numerous rules and restrictions is a complete loss of liberty in every sense of the word. It is certainly comparable to confinement at minimum security facilities, which do not place prisoners in prison cells. See American Correctional Association, Standards for Adult Correctional Institutions §§2-4131, 2-4177 (2d Ed. 1981). It provides punishment, incapacitation (removal from society), deterrence, and rehabilitation. See *Berger, supra*, at 219-222 (1993). As the court of appeals noted, granting sentence credit for substantial custodial confinement has been advocated by knowledgeable observers.

> Such an understanding of "custody" has also been articulated by organizations involved in defining the standards in the filed. See 3 American Bar Association, Standards for Criminal Justice 18-319 (2d ed. 1980) (should grant credit for time spent in "custody," including any bail program which "imposes substantial restrictions on the offender's freedom of activity"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections Sec. 5.8 comment. (1973) ("In some cases . . . conditions for pretrial release are substantial and involve serious restrictions on liberty. Where supervision is substantial, courts should be authorized to grant a measure of credit for such time against the sentence imposed."). Pet. App. 18a, 19a.

The Solicitor General argues that allowing the court of appeals decision to stand, and not adopting the BOP's simply "bright-line" rule – released or detained – will

cause an administrative nightmare for the BOP, and present federal courts with endless claims of "jail-type confinement" that will be difficult for judges to resolve.

This argument distorts the narrow holding the court of appeals has carefully crafted and limited. Only a small percentage of defendants are held in halfway houses before sentencing Pet. App. 21a. Only defendants totally confined to the halfway house premises by court order are apparently subject to the ruling. Expressly excluded are even "confinement in drug rehabilitation facilities . . . [or] any halfway house where the defendant leaves to work during part of the day," however restrictive the regimen at such a facility. (Pet. App. 21a-24a). The court of appeals' definition of "official detention" does not include "the vast array of alternative mechanisms" used in federal confinement, and its ruling does not "go as far as does the Ninth Circuit which appears to authorize credit for confinement under somewhat less restrictive conditions" than would meet the criterion of jail-type confinement. Pet. App. 19a, 21a. The court pointed out that many of the cases which granted sentence credit in the Ninth Circuit would not meet its "jail-type confinement" standard, such as living with parents, residing in a halfway house with work release, or daytime release from the facility. It went on to point out that the results in the cases in which credit was denied would not change because "the conditions imposed were not substantial enough to be equivalent to imprisonment," e.g. home confinement, confinement to an uncle's apartment with some release provisions, pre-trial confinement for medical treatment. Pet. App. 20a, 21a. Therefore,

unless the defendant is ordered by the court to be confined to the halfway house 24 hours a day, as was Koray, it will be difficult to argue that he is in "jail-type confinement." Almost all the cases cited by the Solicitor General involve these lesser degrees of confinement.[10]

Petitioner also asserts that the court of appeals decision will lead to the unwarranted sentencing disparities the Sentencing Reform Act sought to reduce because district judges' interpretations of the decision will be far more cumbersome and produce less uniformity than the BOP's current view.[11] However, the more significant, real and reducible sentencing disparity is the one caused by the BOP's current interpretation of §3585(b). The evil of disparity is an unwarranted "variation among sentences imposed upon similarly situated offenders." *Mistretta v. United States*, 488 U.S. 361, 366 (1989). Under the BOP's interpretation, Koray will serve a sentence longer than someone with the same lack of criminal history, sentenced for the same crime, and given the exact same 41 month sentence, solely because his confinement was transferred by one form of court order from the county jail to a halfway house before he began serving his sentence. The other prisoner will be given credit for his entire presentence confinement because he was confined in a facility under a court order called a "detention order", and because he remained confined in a facility not called a halfway house.

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[10] See, e.g., cases cited in the Brief for the United States at p.6, n.1.

[11] See, Brief for United States at pp.15, 16.

The Solicitor General appears to read the court of appeals ruling as relying primarily on the restrictions imposed at the halfway house to which Koray was confined (Brief for the United States at p.27), rather than on the explicit conditions of the "Release on conditions" order stating that Koray "be confined to the premises" of the halfway house and "shall not be permitted to leave for any reason" unless accompanied by a government agent. Perhaps this is because these precise words of the order never appear in the Solicitor General's brief. It is clear that the most important factor in the court of appeals' decision was the precise language of the order, Koray's total confinement to the halfway house. Without such total confinement, no matter how restrictive the rules of the halfway house, the court would not have found "jail-type" confinement. The Solicitor General's reading permits him to argue that it would be very difficult for the BOP to determine what rules prevailed at a given halfway house because it will have to deal with many facilities with varied rules. (Brief for the United States at pp.15-17). This allows him to argue that, by contrast, the BOP "bright-line"rule will produce greater uniformity and can much more easily be implemented because

> "the Bureau can make credit determinations on the basis of the *documentary evidence that ordinarily accompanies the inmate after he is sentenced – the inmates judgment of conviction and bail form.* Those documents will ordinarily disclose whether the defendant was released on bail *. . . and on what conditions."* (Brief for the United States at p.28) (emphasis supplied).

However, the ruling of the court of appeals would certainly permit the BOP to rely on exactly such "documentary evidence" and therefore to "make credit determinations quickly and efficiently on the basis of information obtainable from reliable law enforcement sources," and, therefore, there would be no undue administrative burden. (*Id.* at p.28). Since the conditions imposed by the "Release on conditions" order are the most important thing to be considered in determining whether "jail-type confinement" existed, all the BOP has to do to determine the extent of the defendants' confinement is to look at the "documentary evidence that ordinarily accompanies the inmate," the same "Release on conditions" form which either becomes part of the defendants' prison file, or is readily available in the files of the sentencing court. Only if such total confinement has been ordered does the BOP then have to determine if the rules and restrictions of the particular halfway house were sufficiently "jail-type" to merit sentence credit. The limited inquiry then becomes whether operating rules such as security checks, drug testing and limited visitation are part of the halfway house regimen. The BOP has contracts with many halfway houses, which it uses for sentenced prisoners.[12] There is no evidence that it would be difficult to obtain this information in the limited number of cases in which it will be necessary. There is also no reason to believe that reading court orders to find out what conditions of pre-sentence confinement have been provided requires an interpretation of a standard so "amorphous or

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[12] Two-thirds of defendants in the federal system spend time in a halfway house. *Berger, supra,* 193 n.9.

elusive" that it will result in a lack of national uniformity in sentence crediting. The BOP's performance of its functions will not be rendered more difficult by the Third Circuit's ruling, and its award of sentence credit will be fairer.

It is well settled that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[13] *United States v. Bass*, 404 U.S. 336, 347 (1971). To the extent ambiguity is present in the statutory reach, the rule of lenity prescribes adoption of the construction most favorable to the prisoner. *See, e.g., McNally v. United States*, 483 U.S. 350, 359-360 (1987). It is respondent's contention that the statute is not ambiguous with respect to whether "official detention" is limited to the custody of the Attorney General pursuant to a "detention order", for the reasons offered, *supra*. Respondent submits it is clearly not so limited. To the extent there is ambiguity in §3585(b) as to which forms of custody are within the meaning of "official detention," this ambiguity should be resolved in the prisoner's favor. However, the BOP, as it has done in dealing with a comparable issue under the same statute,

> has adopted a harsh interpretation in the face of the natural and obvious interpretation of the statutory language [of §3585]. In light of the rule of lenity, that interpretation is unreasonable.

*United States v. Davis, supra*, at 644.

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[13] This case is before this court because there is a split of authority in the Circuits concerning the reach of "official detention." *See, Wilson*, 112 S.Ct. at 1359 n.11 (citing diverse authority and noting Circuit split).

Koray was not, as the Solicitor General repeatedly states, "released on bail." There was not a single moment in the 150 days of his confinement, even during court appearances or if he was taken out of the facility by Special Agent Bass, that Koray was "at large" or released into the community. He was never "free" in any sense of the word. The use of the phrase "released on bail" implies that the "release" and its conditions were somehow a request by the defendant that the court granted, that Koray chose an environment he saw as more pleasant than the facility for those held under a "detention order", and should live with his choice. There is nothing in the record to support such a claim. The "Release on conditions" order did not release Koray from "official detention". It merely transferred his confinement from one detention facility to another. This order was entered *after* his plea of guilty. Given that his guilt was now established and a sentence of incarceration under the sentencing guidelines was now a certainty, a request *by a defendant* at this point for release from detention was unlikely to be granted. What is clear is that this "Release on conditions" was not for the benefit of the defendant, unlike what is usually true under home confinement or residing with a relative, or confinement to a drug treatment facility. The purpose of the condition that Koray be "confined to the premises" of the halfway house was not to help him; this court ordered confinement's primary purpose was to assure his presence and protect the "safety of . . . the community." (18 U.S.C. §3142(c)(B)(xiv)). Protecting the community from further crimes is a major purpose of a sentence of imprisonment. (See 18 U.S.C. §3553(a)(2)(C) 1988). Since total confinement

at the halfway house served this purpose fully, it is therefore especially unfair not to accord Koray sentence credit.[14]

The greatest disparity caused by the current BOP view urged by the Solicitor General is not even mentioned in the government's brief. *Sentenced* prisoners are permitted to be assigned to halfway houses near the completion of their terms by the BOP. These sentenced prisoners are usually permitted work release and other leaves; they are not totally confined to the premises for their entire stay at the halfway house, as Koray was. If they are so confined to the premises, their conditions of confinement are usually comparable to those imposed on Koray.

The BOP considers the time these sentenced prisoners spend in a halfway house part of their sentence of imprisonment. If Koray had spent the last 5 months of his sentence at the same halfway house, even under less than total confinement (e.g. leaving the premises for work release) and subject to the same operational rules, instead of the 5 months he spent there totally confined to the premises, the BOP would have counted that last five months as part of his sentence. The BOP's interpretation of §3585(b) denies Koray sentence credit simply because he was placed in the halfway house at the wrong time. "This interpretation of the statute would make the award of credit arbitrary, a result not to be presumed lightly."

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[14] As the court of appeals pointed out, there is also "inherent unfairness" in denying sentence credit to a defendant who is so "released" without giving the defendant notice that his "release" will have that result. Pet. App. 23a.

*United States v. Wilson*, 112 S.Ct. at 1354. Nothing in the language of the statute, the language of related statutes, or its legislative history requires this anomalous result. The plain meaning of the statute, the intent of Congress, as well as fairness and reason, require that Koray be given sentence credit for the 150 days at the halfway house where he suffered a total loss of liberty.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 94-790

In The

# Supreme Court of the United States

October Term, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Petitioners,*

v.

ZIYA K. KORAY,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

## APPENDIX

[seal]

**U.S. Department of Justice**
Federal Bureau of Prisons

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| **Program Statement** | **OPI:** CPD<br>**NUMBER:** 7310.02<br>**DATE:** October 19, 1993<br>**SUBJECT:** Community Corrections Center (CCC) Utilization and Transfer Procedure |

1. PURPOSE AND SCOPE. To provide guidelines to staff regarding the effective use of Community Corrections Centers (CCCs). This Program Statement defines placement criteria, requires that staff members start the placement process in a timely manner, and defines the circumstances when inmates may refuse community corrections (CC) programs. It also establishes an operational philosophy for CCC referrals that, whenever possible, eligible inmates are to be released to the community through a CCC, unless there is some impediment as outlined herein.

CCCs provide an excellent transitional environment for inmates nearing the end of their sentences. The level of structure and supervision assures accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills.

One reason for referring an inmate to a CCC is to increase public protection by aiding the transition of the offender into the community. Participating in community-based transitional services reduces the likelihood of an inmate with limited resources recidivating than might be the case

if the inmate makes an abrupt transition from the institution to the community. While clearly dangerous inmates should be separated from the community until completion of their sentences, other eligible inmates should generally be referred to CCCs to maximize the chances that they will successfully reintegrate into society.

* * *

4. STATUTORY AUTHORITY. 18 U.S.C. Section 3624(c), provides:

> "The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community. The authority provided by this subsection may be used to place a prisoner in *home confinement*. The U.S. Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody."

18 U.S.C. Section 3621(b) provides:

> "The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility . . . the Bureau determines to be appropriate and suitable." A CCC meets the definition of a "penal or correctional facility."

Therefore, the Bureau is not restricted by Section 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the "last ten per centum of the term," or more than six months, if appropriate.

Section 3624(c), however, does restrict the Bureau in placing inmates on *home confinement* to the last six months or 10 percent of the sentence, whichever is less.

## 5. COMMUNITY-BASED PROGRAMS

a. *Community Corrections Centers (CCC).* CCCs, commonly referred to as "halfway houses," provide suitable residence, structured programs, job placement, and counseling, while the inmates' activities are closely monitored. All CCCs offer drug testing and counseling for alcohol and drug-related problems. During their stay, employed inmates are required to pay a subsistence charge to help defray the cost of their confinement; this charge is 25 percent of their gross salary, not to exceed the average daily cost of their CCC placement. Failure to make subsistence payments may result in disciplinary action.

These contract facilities, located throughout the United States, provide three program components: Community Corrections, Prerelease, and Home Confinement:

(1) The *Community Corrections Component* is designed as the most restrictive option. Except for employment and other structured program activities, an inmate in this component is restricted to the CCC. An inmate will ordinarily be placed in the Community Corrections Component upon arrival at the CCC. This orientation period normally lasts for two weeks or until the inmate has demonstrated to CCC staff the responsibility necessary to function in the community. Based on their professional judgment, CCC staff will determine when an inmate is prepared to advance to the prerelease component.

(2) The *Prerelease Component* is designed to assist inmates making the transition from an institution setting to the community. These inmates have more access to the community and family members through weekend and evening passes.

(3) The *Home Confinement Component* is restricted to inmates who ordinarily are serving the last 10 percent of their sentences not exceeding six months. This is a selective status that is authorized discriminately according to an inmate's adjustment and needs. Inmates are permitted to reside at home and be gainfully employed while continuing in official detention status. Sub-section b.(4) below provides more detail about this program.

* * *

6. RELEASE PLAN. Staff shall begin release planning at an inmate's first team meeting, normally the initial classification, and shall continue throughout the inmate's confinement. The following guidelines apply:

a. Planning early in an inmate's period of confinement is necessary to ensure prerelease needs are identified and appropriate prerelease programs are recommended.

b. Preliminary decisions regarding eligibility for CC programs is to be made well in advance of the last year of confinement.

c. A final and specific prerelease plan, including a decision as to CCC referral, is normally established at a team meeting no later than 11 to 13 months before an inmate's projected release date.

7. CCC CRITERIA AND REFERRAL GUIDELINES. Staff shall make recommendations for CCC placements based on assessments of inmate needs for services, public safety, and the necessity of the BOP to manage its inmate population responsibly. CCCs are a program element and are not to be used as a reward for good institutional behavior, although an inmate's institutional adjustment may be a factor in making a referral determination.

A number of factors must be weighed to determine the length of CCC placement for inmates, including their individual needs and existing community resources. Institution staff make a recommendation for a specific placement date to the CCM office, and Community Corrections staff determine placement dates and closely monitor average lengths of stay to efficiently manage the bedspace usage. Budgetary constraints also are a key consideration and may affect average lengths of stay. CC staff shall make every effort to establish an acceptable date as close to the institution's recommended date as possible. In any event, the acceptance date shall not precede the recommended date.

The following CCC referral guidelines apply:

a. An inmate may be referred up to 180 days, with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval and the Chief U.S. Probation Officer in the inmate's sentencing district to determine whether the sentencing judge objects to such placement.

b. The ultimate goal is to maximize each eligible inmate's chances for successful release and a law-abiding life.

c. When an inmate has a history of escape or failure in one or more CCC programs, careful review and consideration should be given regarding the suitability of participation and the length of placement.

d. Inmates with handicaps, minor medical conditions, or disabilities may also be considered for community placement. Inmates are required to assume financial responsibility for their health care while assigned to community programs. When an inmate is unable or unwilling to bear the cost of necessary medical care, the inmate is to be denied placement.

* * *

10. CCC REFERRAL PROCEDURES. Normally 11 to 13 months before each inmate's probable release date, the unit team shall decide whether to refer an inmate to a Community Corrections program.

a. *Referral to CCM.* Staff shall use the Referral Form (BPS-210 (73) Attachment B) when referring an inmate for transfer to a CCC. Information included in the Additional Information (12) and Specific Prerelease Needs (13) sections must be as specific as possible and not just reference the progress report. Attachment B contains instructions for completing the Referral Form and related materials. Signed copies of the "Conditions of Residential Community Programs" (Attachment C) must be included with all CCC referrals. The Warden is the final decision-making

authority for all CCC referrals recommended by the unit team.

If the Warden approves the CCC referral, the unit team shall forward two copies of the Institutional Referral Form and appropriate attachments to the CCM. Two copies of the referral are prepared so that one may be forwarded to the CCC while the CCM retains the other for reference. The referral packet must be forwarded to the CCM at least 60 days prior to the requested placement date. However, earlier referrals are encouraged to facilitate the release process.

If the placement is for 45 days or less, and the release method by parole, a copy of correspondence directed to the U.S. Parole Commission outlining the release plan and requesting parole certificates, as well as copies of U.S. Probation's letter recommending release plan approval, must be included in the referral package.

* * *

e. *Transfer Date.* When CCMs are notified of an inmate's acceptance by a CCC, a transfer date to the CCC is to be established, and the CCM will enter the SENTRY destination assignment transaction. The effective date will be the approved future transfer date.

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Kathleen M. Hawk
Director

[Attachments omitted]

OPERATIONS
MEMORANDUM

DATE: OCTOBER 23, 1989

SUBJECT: CREDIT FOR TIME IN CUSTODY UNDER 18 USC 3585(B)

CANCELLATION DATE: OCTOBER 31, 1990

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I. PURPOSE: TO ADVISE STAFF OF THE PROCEDURES FOR THE CREDITING OF JAIL TIME UNDER TITLE 18, U.S. CODE, SECTION 3585(B).

II. DIRECTIVE REFERENCED:

PROGRAM STATEMENT 5880.24, SEPTEMBER 5, 1979, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568".

III. BACKGROUND: PRIOR TO NOVEMBER 1, 1987, JAIL TIME CREDIT, FOR TIME IN CUSTODY BEFORE SENTENCING, WAS CONTROLLED BY TITLE 18 USC, SECTION 3568. AS STATED UNDER THAT SECTION . . . "THE ATTORNEY GENERAL SHALL GIVE ANY SUCH PERSON CREDIT TOWARD SERVICE OF HIS SENTENCE FOR ANY DAYS SPENT IN CUSTODY IN CONNECTION WITH THE OFFENSE OR ACTS FOR WHICH SENTENCE WAS IMPOSED". PROGRAM STATEMENT 5880.24, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568", ESTABLISHED THE PROCEDURES FOR MAKING JAIL TIME CREDIT DETERMINATIONS. HOWEVER, WITH THE IMPLEMENTATION OF THE COMPREHENSIVE CRIME

CONTROL ACT (CCCA) ON NOVEMBER 1, 1987, SECTION 3568 WAS REPEALED FOR OFFENSES COMMITTED ON OR AFTER THAT DATE. FOR OFFENSES COMMITTED PRIOR TO NOVEMBER 1, 1987, THE PROVISIONS OF SECTION 3568 AND PROGRAM STATEMENT 5880.24 REMAIN IN EFFECT.

IV. ACTION: THE FOLLOWING PROVISIONS OF TITLE 18 USC SECTION 3585(B), CONTROL THE CREDITING OF JAIL TIME CREDIT, FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987.

SECTION 3585(B) CREDIT FOR PRIOR CUSTODY –

"A DEFENDANT SHALL BE GIVEN CREDIT TOWARD THE SERVICE OF A TERM OF IMPRISONMENT FOR ANY TIME HE HAS SPENT IN OFFICIAL DETENTION PRIOR TO THE DATE THE SENTENCE COMMENCES –

(1) AS A RESULT OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; OR

(2) AS A RESULT OF ANY OTHER CHARGE FOR WHICH THE DEFENDANT WAS ARRESTED AFTER THE COMMISSION OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED, THAT HAS NOT BEEN CREDITED AGAINST ANOTHER SENTENCE."

UNDER SECTION 3585(B), AN INMATE WILL RECEIVE JAIL TIME CREDIT ON THE FEDERAL SENTENCE, FOR TIME SPENT IN PRE-SENTENCE CUSTODY IN CONNECTION WITH THE FEDERAL OFFENSE, AND FOR ANY TIME SPENT IN PRE-SENTENCE CUSTODY AFTER THE DATE OF THE FEDERAL OFFENSE, IF

CREDIT IS NOT AWARDED TOWARD SERVICE OF ANOTHER SENTENCE. FOR EXAMPLE, IF AN INMATE IS ARRESTED ON STATE CHARGES, AFTER THE DATE OF THE FEDERAL OFFENSE, AND IT IS DETERMINED THAT THE STATE DID NOT CREDIT THE PRE-SENTENCE CUSTODY TOWARD A STATE SENTENCE, THE TIME SPENT IN STATE PRE-TRIAL CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE, WILL BE CREDITED TOWARD THE FEDERAL SENTENCE.

IN THE FOLLOWING SITUATIONS, IT MAY ALSO BE DETERMINED THAT THE STATE HAS NOT AWARDED CREDIT TOWARD THE STATE SENTENCE IF:

(1) THE STATE CHARGES ARE DISMISSED.

(2) THE STATE SENTENCE IS VACATED WITH FURTHER PROSECUTION DEFERRED, THEREBY EFFECTIVELY VACATING THE STATE'S AWARD OF JAIL CREDIT.

(3) STATE PROBATION IS GRANTED, OR

(4) THE STATE ORDERS THEIR SENTENCES TO RUN CONCURRENTLY WITH THE FEDERAL SENTENCE, AND THE STATE SENTENCE WILL BE ABSORBED PRIOR TO GRANT OF GOOD TIME, RESULTING IN NO BENEFIT FROM THE STATE JAIL TIME.

ORDINARILY, IF A SENTENCE RESULTS FROM STATE CHARGES, THERE WILL BE A PRESUMPTION THAT THE INMATE DID RECEIVE CREDIT FOR THE PRE-SENTENCE TIME. HOWEVER, IF IT CAN BE DEMONSTRATED THAT THE STATE DID NOT CREDIT THE TIME, THE PRE-SENTENCE CREDIT WILL BE

AWARDED FOR TIME IN STATE CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE.

THESE PROCEDURES, UNDER SECTION 3585(B), ONLY APPLY TO OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987. QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS BRANCH (FTS 724-3050).

CLAIR A. CRIPE
GENERAL COUNSEL

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